IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CONFIRMATION CASE NO. 01 OF 2006

(Reference made by the 9th Ad-hoc
Additional Sessions Judge, Bombay)

The State of Maharashtra .. Appellant.
(Org. Complainant)

V/s.

Arjun Laxman Jogadiya
alias Abdul Rehman Shaikh .. Respondent.
(Org.Accused)

Mrs. A.S. Pai, Addl.P.P. for the Appellant- State.

Smt.Sushma Nair, Advocate for the Respondent-Accused.

WITH
CRIMINAL APPEAL NO. 243 OF 2006

Arjun Laxman Jogadiya)
alias Abdul Rahman Shaikh) .. Appellant.
at present in the Yerwada -) (Org.Accused)
Central Prison, Pune,)
r/o. Room No.10,Indira Nagar)
Near Junior Artist Office,)
Dr.E.Moses Road, Sat-rastha)
Dhobighat, Mumbai - 400 011.)

V/s.

The State of Maharashtra) .. Respondent.
at the instance of Agripada) (Org.Complainant)
Police Station, vide)
C.R.No. 194/04, C.c.No.7/PW/05)
Sessions Case No. 158/2005.)

Smt. Sushma Nair, Advocate for the Appellant-Accused.

Mrs. A.S. Pai, Addl. P.P. for the Respondent -State.

CORAM : D. G. DESHPANDE
S. A. BOBDE, JJ.

DATED : 11TH AUGUST, 2006.

ORAL JUDGMENT .: (Per Bobde,J.)

1. The learned Sessions Judge, Greater Bombay at Sewree, in Sessions Case No. 158 of 2005, has convicted the accused -Arjun Laxman Jogadiya alias Abdul Rehman Shaikh for offences punishable under sections 364, 366, 376, 377 and 302 as also under section 201 of the Indian Penal Code. The accused has been sentenced under section 302, to be hanged till death. The learned Sessions Judge has, therefore, referred the matter for confirmation to this court under section 366 of the Criminal Procedure Code.

2. Against the conviction and sentence, the accused has preferred Criminal Appeal No. 243/2006. Both have been heard together by us.

3. The case of the prosecution is that on 10.11.2004, the accused kidnapped an eleven year old girl by name Bhagyashree and then after having sex with her against the order of nature, raped her and then murdered her.

4. The prosecution story is that at around 19.30 hours, Smt. Vaishali Nakase, mother of the deceased, visited her mother alongwith her children - Bhagyashree (deceased) and Santosh to see preparation for the Diwali festival which had begun. At about 23.00 hours Smt. Vaishali Nakase sent her daughter to bring some food articles. Her daughter Bhagyashree brought the articles and told the mother -Vaishali that she would come back in five minutes. Since she did not return till 23.30 hours, the mother went in search of her (Bhagyashree); initially to the house of her sister Nandini. Since she was not found there and in fact was nowhere to be found; at about 1.30 a.m.,after midnight, she lodged a complaint with Agripada Police Station, Mumbai that Bhagyashree was missing.

5. Later on when she inquired with her son Santosh, he told her that when Bhagyashree was returning, the accused known to the children as Arjun-Mama offered Chinese rice to them. Thereafter, the accused asked Santosh to proceed home and he proceeded with Bhagyashree towards the dog office.

6. On 11.11.2004, the complainant’s sister Manisha who resided in front of the Municipal Dog Office,

reported that some boy had noticed a leg of a female on the terrace of the dog office. Vaishali alongwith her sister Laxmi therefore, proceeded to the dog office. The police arrived at the spot. On the terrace, Laxmi identified the body as that of the deceased Bhagyashree. The body was brought down and identified by Vaishali also, who noticed some rice in her mouth and blood-stains on her frock and on the private parts. It was obvious that Bhagyashree had been raped and then murdered and her body was thereafter hidden on the terrace of the dog office. Soon thereafter, the Police treated Vaishali's complaint as a part and parcel of the F.I.R. and registered an offence against an unknown person at about 17.45 hours.

7. During the course of investigation, the police drew inquest panchanama and sent the body for post-mortem. They seized several things including the frock and shoes of the deceased. They also seized a piece of bamboo mattress, some blood stained earth and chinese rice etc. from the spot. They recorded the statement of the accused u/s. 27 of the Evidence Act about the confession, seized clothes i.e. his pant, T-shirt and under- wear. They forwarded those articles to the chemical analyser. After receiving the C.A. report and on completion of the investigation, and producing the

accused persons before the Chief Metropolitan Magistrate, a charge-sheet was filed by the police. The case was then committed for trial to the Sessions Court.

8. The accused was charged. He pleaded not guilty.

9. Upon considering the entire evidence led by the prosecution and hearing the accused, the learned Sessions Judge, found the accused guilty and convicted him for the offence punishable under the following sections of the Indian Penal Code :-

i) For the offence punishable u/s. 364 of IPC and sentenced to suffer imprisonment for life and fine of Rs. 500/- in default to suffer two months R.I..

ii) For the offence punishable u/s.366 of IPC and sentenced to suffer imprisonment for ten years R.I. and fine of Rs. 200/-, in default to suffer two months R.I..

iii) For the offence punishable u/s. 376 of IPC and sentenced to suffer ten years R.I. and fine of Rs.200/- in default to suffer two months R.I..

iv) For the offence punishable u/s. 377 of IPC and sentenced to suffer life imprisonment and fine of Rs.200/-, in default to suffer two months R.I..

v) For the offence punishable u/s. 302 of IPC and sentenced to suffer death. He be hanged till his death. He is further sentenced to pay fine of Rs. 500/- in default to suffer two months R.I..

vi) For the offence punishable u/s. 201 of IPC and sentenced to suffer seven years R.I. and fine of Rs. 200/- in default two months R.I..

vii) These punishments were directed to run concurrently.

10. What falls for our consideration is whether the sentence imposed by the learned Sessions Judge is liable to be confirmed; and the Appeal filed by the Accused.

11. There is no eye witness to the actual act of

rape, the unnatural offence and murder. The evidence as to the complicity of the accused is circumstantial, mainly, comprising of the fact that he was last seen with the deceased. The other kind of evidence in regard to the complicity of the accused comes from the chemical analysis of all things recovered by the prosecution, particularly in relation to the blood of the deceased found on the clothes of the deceased and the accused.

12. In determining the complicity of the accused in such a case, the question with whom the deceased was last seen, assumes importance. The prosecution has examined four witnesses who testified that the deceased was last seen with the accused. They are the complainant-P.W.1 Vaishali Anand Nakashe, who is the mother of the deceased; then P.W.2-Manisha, the complainant's sister and aunt of the deceased, who resides near the dog house; P.W.3-Sambhaji Ramji Pawar, the person who runs a Chinese Rice Stall and P.W.4-Santosh, the younger brother of the deceased.

13. The mother of the deceased Vaishali deposed that on 10.11.2004 when the deceased Bhagyashree told her at about 10.00 p.m. that she would come back within five minutes, but did not; she went out in search of the deceased. She inquired with her sister Nandini and with

other relatives, but did not find the deceased. She, therefore, lodged a complaint with the Agripada Police Station at 1.00 a.m. that her daughter Bhagyashree was missing. After she came home, she again asked her son Santosh about his sister. He told his mother -Vaishali that when Bhagyashree brought flour, she met the accused who was known to them as Arjun Mama. He (accused) told her (the deceased) that he would treat her to Chinese rice and he then took her. She then went looking for the accused in his house. She found the accused frightened and in an intoxicated condition. This witness identified the accused before the court also. Santosh has in his own deposition elaborated on the events. Later on some children who were playing near the dog house which appears to be a hospital for dogs, noticed a leg of a small female child on the terrace. The leg was actually protruding from under the garbage and debris. Vaishali's sister Manisha, who was residing near the dog hospital, learnt about the incident and informed Vaishali. When Vaishali visited the dog hospital the police also arrived on the scene. They went to the terrace of the dog hospital and found the body of a female child, which was identified by this witness as her daughter -Bhagyashree from her chappals, bangles etc.. The mother Vaishali also noticed some chinese rice in the mouth of her daughter and blood on

her private parts and on her frock and scratches on her neck.

14. The mother deposed that her daughter used to call the accused as "Arjun Mama" and he used to call her as "Lale, Pade" affectionately. She also stated that the accused frequently gave her money and sweets.

15. The sister of PW-1 -Smt.Manisha Jadhav, who is aunt of the deceased resides near the dog hospital. She found that around 11 p.m. her niece, i.e. the deceased Bhagyashree, and her brother Santosh were with the accused near a rice stall. They had purchased some rice and were standing near the dog office. She told the court that around 11.30 p.m.her sister Vaishali had come, inquired about Bhagyashree and they then together went to the house of the accused - once at 12.00 at night and then at 2.00 a.m.. On the later occasion, the accused got annoyed and had a quarrel with them. On the next day, she received information that some children were playing and noticed a leg of a female child on the terrace of the dog office. She saw the body and identified it. There was some chinese rice in the mouth of the deceased and her frock was stained with blood and there were blood stains on her underwear.

16. The brother of the deceased deposed before the court that at 11.30 p.m. when he was with his sister Bhagyashree near the dog office, the accused who was known to them as "Arjun Mama" came there and asked the deceased if she would have chinese rice. Then both of them alongwith the deceased went towards the chinese stall. There the accused purchased two plates of chinese rice. The accused then asked this boy to go to his house and he then took his sister Bhagyashree towards the dog house. This witness has denied the suggestion that he was tutored by his mother and the police.

17. Regarding the evidence of P.W.1- Vaishali Anand Nakashe, P.W.2- Manisha Maruti Jadhav and P.W.4- Santosh Anand Nakashe, Mrs. Nair, the learned counsel for the accused contended that there are discrepancies in their evidence regarding the happening on that night. The cumulative evidence of the three is that P.W.1 had gone to her mother’s house for making preparation for the Diwali. Deceased Bhagyashree and Santosh P.W.4 were with her, from there she sent Bhagyashree to home to bring some flour. Then Bhagyashree brought flour, and then went away about which Santosh P.W.4 says he saw Bhagyshree going along with Arjun Mama-the accused and Manisha P.W.2 also saw Bhagyashree in the company of

accused, which according to the prosecution is the evidence for last seen together. According to Mrs. Nair, firstly, from the house of Manisha or house of the mother of P.W.1, the shop of P.W.3 who sold Chinese rice to the accused was not visible, secondly, according to her there was no explanation that Santosh did not narrate to his mother about Bhagyashree going with the accused at the first instance.

18. We do not find any anomaly in the evidence of these three witnesses, it has to be remembered that Santosh is a boy of eight years of age and he might have not understood the significance of seeing Bhagyashree with the accused. The fact that in the first missing complaint name of the accused is not disclosed, clearly shows that till the missing complaint was lodged, P.W.1 was not knowing that Bhagyashree had gone with the accused. About evidence of Manisha P.W.2 that she saw the accused and Bhagyashree near the stall of P.W.3 Sambhaji, nothing has been brought in the cross examination of these three important witnesses about the distance, situation and location of their respective houses and the stall of P.W.3. Therefore, these arguments of Mrs. Nair, are required to be rejected.

19. A crucial piece of evidence was brought before

the court through witness Sambhaji Pawar-P.W.3, who runs the chinese stall, referred to by the other witnesses. This witness PW-3 deposed that he runs a chinese stall, which serves chinese rice. The stall is at about 14 to 15 feet away from the dog house. On that day, he closed the stall at about 12 at night. At about 11 p.m., the accused Arjun Jogadia, whom he knew for the last 10 years, came to the stall alongwith the deceased Bhagyashree and her brother Santosh. The accused ordered two plates of half chicken rice. He categorically deposed that then the accused proceeded alongwith Bhagyashree towards the dog office. The credibility of this witness was sought to be shaken by the learned counsel for the accused on the ground that he visited the police station on 13.11.1004 when the incident was discovered on 11.11.2004. We see no merit in this criticism since this witness has clearly stated that he was called by the Police to the police station on 12.11.1004, but he could not meet the police on that day and he visited on 13.11.2004.

20. Regarding the evidence of PW-3 - Sambhaji Pawar, Mrs.Nair, the learned counsel for the accused also contended that if this witness was busy in looking after his customers at that night, then it was impossible that he noted Bhagyashree with the accused. She also stated

that the delay of two days in recording the statement creates strong suspicion. We are not convinced by this argument. The witness has explained in his cross examination that even though the police had called him he used to be busy in business from 6 p.m. to 12 p.m. and therefore he could not contact the police on 11.11.2004 and 12.11.2004 and then gave statement when the police contacted him on 13.11.2004. We also do not find any substance in the submissions that this witness had no reason to note Bhagyashree with accused at the relevant date and time because witness was knowing the accused since more than 10 days. He was also knowing Bhagyashree as she was residing in his neighbourhood, and, therefore, if the accused went there with a girl not related to him, then it was natural for this witness to remember having seen accused and Bhagyashree at the relevant time and place.

21. From the above evidence there is no doubt that the deceased was last seen in the company of the accused on the night of 10.11.2004 at around 11.00 p.m. and furthered the accused to the chinese rice stall and then the accused proceeded with the deceased towards the dog house, on the terrace on which the body of the deceased was found.

22. The learned counsel for the accused submitted the circumstance of the accused being last seen with the deceased, is not sufficient to implicate the accused. She relied on two decisions of the Supreme Court i.e. in the case of **Ramreddy Rajeshkhanna Reddy & Anr. vs. State of A.P., reported in 2006 ALL MR (Cri) 1533** (S.C.); and in case of **Bodhraj alias Bodha and others vs. State of Jammu and Kashmir, reported in (2002) 8 Supreme Court Cases 45.** In both these cases, the Supreme Court has held that the last seen theory applies where the time gap, between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead, is so small that the possibility of any person other than the accused being the author of the crime becomes impossible.

23. Applying the principles of these two cases, we find no reason to discard the circumstance of the accused having been last seen with the deceased in this case. The time gap between the time the accused was last seen i.e. on 10.11.2004 at 11.00 p.m. and when the deceased was found dead i.e. in the afternoon on 11.11.2004 on the terrace of the dog office, do not suggest that the author of the crime was not the accused particularly, having regard to the other circumstances. It must be noted that the deceased was found dead within

a period of about 12.00 hours after she was last seen with the accused. The body was noticed by PW-8, a boy who climbed onto the terrace at about 11.30 a.m. in search of the cricket ball. Even before that, it must be noticed that the mother of the deceased had found her missing at around 11.30 p.m. on the previous night itself. Having regard to the tender age of the deceased, who was a young girl, there is no reason to imagine that she would wander at night on her own, after having gone with Arjun Mama, the accused, to have rice. We, therefore, reject the suggestion that there is possibility of any other person being author of the crime, keeping in view the circumstances of the case and other evidence which is dealt with later.

24. The body was found by PW-8, a boy whose name is Sahebali Shahabuddin Shaikh, aged about 17 years, who deposed that on 11.11.2004 he was playing cricket near the dog office with some other boys. The ball went on the terrace of the dog office. The boy climbed on the terrace with the help of a grill and noticed a woman’s leg on the terrace. He found some earth on the leg. This boy stepped down from the terrace and shouted and he was there when the police came on the scene.

25. The condition in which the body was found on the

terrace is found in the deposition of PW-10 Sadanand Laxman Rasam, one of the Investigating Officers. He stated that he climbed on the terrace and noticed a leg of one child, hidden under the debris and garbage. They removed debris and garbage, which covered the body, in the presence of the panchas and found the body of the deceased covered by blood stained frock. He noticed that the blood was oozing from the private parts of the body and there was blood in the anus. The body had other blood stains and marks on the neck. The circumstances in which the body was found is a clear pointer to the homicidal nature of the death.

26. The body was sent for post mortem and was examined by doctor Shailesh Chintaman Mohite, PW-7, who deposed that an extreme amount of force has been used at the time of commission of sexual offence on the deceased girl, which apart from rape, included anal intercourse. The doctor noticed several external injuries on the body of the deceased in the form of abrasions on the forehead, on both sides of neck, on the cheeks, over the shoulder near neck, knees, thighs, legs, wrist joint and the buttock. Most of the injuries are ante-mortem. The posterior fourchette was totally lacerated. Vaginal muscles layer was seen. There was a tear in the vaginal muscles. The hymen was totally lacerated from 3’O clock

to 9’O clock. The anal orifice was torn and showed irregular margins. There is nothing in the cross-examination which shakes the testimony of the doctor that extreme amount of force was used at the time of the sexual offence or the doctor’s deposition that the death was due to asphyxia, due to throttling and due to rape and the girl was unable to obstruct the person who committed rape, unnatural intercourse and murder.

27. The medical evidence was criticized by the learned counsel for the accused on the ground that the exact time of death is not mentioned in the post mortem report. However, we find that for the present case this is not of much significance. The learned counsel for the accused also tried to take advantage of the fact that the examination of the stomach of the deceased did not reveal any digested food particles of chicken and pointed out that the chinese rice stall’s owner has stated in his evidence that the accused had ordered chicken rice. It is a fact that digested food particles did not refer to the chicken. That may be simply possible due to the fact that the deceased did not consume chicken. In any case this has no substantive impact on culpability of the accused. The medical evidence clearly points out the fact that the victim was throttled to death with bare hands after anal

intercourse and rape was committed.

28. The main question that requires consideration is as to the evidence which implicates the accused. The investigating officer, PW-9 -Ashok Sahebrao Salunkhe, seized from the terrace chinese rice, shoes, clothes and mattress. The investigation officer also seized at the instance of the accused from his house his clothes, T-shirt, half pant and underwear which was kept below the cot in his house. This also found to be stained with blood. A panchanama Exh. 26 was drawn in that regard. The investigation officer also seized a frock, white underwear, mattress (chatai), black shoes, piece of cloth and identified them before the court. A panchanama at Exh. 28 was drawn in this regard. These items were also identified by the other investigation officer Sadanand Laxman Rasam.

29. Mrs. Nair also launched attack on the evidence of the prosecution relating to discovery of the clothes of the accused at his own instance. For proving these discoveries, the prosecution examined PW-5 -Raghunath Krishan Vulmukhe. He is a panch witness. He was called by the police to hear what the accused is going to show. He identified the accused in the court and then stated that the accused told in the police station that he has

kept his clothes in his house and he is ready to point out these clothes. A panchanama was prepared as Exh. 25, which was singed by him and other panchas, police officers, and the accused. Then the accused led them to a house. One person opened the house. He was the brother of the accused and then the accused took out the bag, which was kept below one cot and took out one under- pant, one T-shirt and half pant. There were blood stains on these clothes. All those property was taken charge of and the seizure memo was prepared at Exh. 26. The panch has identified his signatures on both the documents and proved the contents. He also identified the clothes of the accused shown to him in the court. There is absolutely no cross-examination to create any suspicion or doubt about the integrity of this witness or about the evidence given by him.

30. Firstly, Mrs.Nair contended that if the accused had really committed the crime he would not have preserved the clothes with blood stains till the police party seized them. She also contended that the house from which the clothes were seized was not proved to be owned by the accused. The so-called brother of the accused had opened the door of the said house which means that the house was accessible to others and therefore clothes were not likely to be of the accused,

but that has been foisted upon him. This criticism by Mrs. Nair on the evidence recovered, is not at all convincing. The recovery is not from the open place. It is from a house. Whether the house is owned by the accused or not is irrelevant; but the manner in which the accused led the police authority to the said house, clearly showed that the accused had the knowledge of the place where these articles were hidden by him. There is no question of the ownership of the house but the question of recovering the articles in pursuance of the statement given by the accused under section 27 of the Evidence Act.

31. Mrs. Nair also tried to contend that the oral evidence of the witness does not show that the clothes of the accused were taken charge of and they are, namely :- Article-D:- T-Shirt; Article-E:- Underpant and Article-F:- Half pant. They were not blood stained. This is factually incorrect. The witness has clearly stated that when the accused produced these three articles, he found that there were blood stains on the clothes. Therefore, the fact that the clothes of the accused had blood stains stands proved by this witness, who gets corroboration from the evidence of the Investigating Officer PW-9- Ashok Sahebrao Salunkhe.

32. Apart from the above, from the terrace the debris and garbage was also removed from the body. Samples of some earth with blood and mixed leaves were also sent to the chemical analyser. This evidence needs to be scrutinized. It is true that the blood group of the deceased remains inconclusive and the blood group of the accused has been determined as blood group -'A'. However, the blood group on the frock and the underwear belonging to the deceased; the half T - Shirt, Bermuda Pant and underwear belonging to the accused and chadar (in pieces) and the piece of mat recovered from the terrace has been conclusively found to be blood group-B'

33. Equally telling is the result of analysis of the earth found on the following items, namely :-

A] (1) Frock and (2) Underwear - belonging to the deceased;

and

B] (3) Half T-Shirt, (4) Barmuda pant and (5) Underwear - belonging to the accused, and (6) the earth found on the terrace alongwith dry leaves collected at the spot where body was found.

The chemical analyser's report is that the earth collected from the aforesaid articles, seized from the deceased and accused matches with the earth found alongwith the dry leaves. This evidence of the similarity of earth found on the clothes of the accused, the clothes of the deceased and earth found at the spot that is on the terrace, is a strong clinching piece of evidence, which alone itself is sufficient to connect the accused with this crime directly.

34. Mrs. Nair, the learned counsel for the accused also contended that it has come in the evidence that there were watchmen for the dog house or the chowkidars; but the police did not record their statements at all. According to her if the watchmen were there then it would have been impossible for the accused to take Bhagyashree, the deceased, upto the terrace. We do not find any force in this submission. It cannot be held that on that night there was some watchman sleeping or were not available in the dog house. Secondly, even if the watchmen were there, the evidence of the dead body on the terrace clearly shows that the deceased Bhagyashree was taken to the terrace and admittedly, the accused would not have succeeded in taking her to the terrace till watchmen were fast asleep. From the

evidence that has come on record, it is proved beyond reasonable doubt that the accused was having very thick relationship with the family of the deceased and particularly, with Bhagyashree, the deceased, and she had, therefore, no reason to suspect any foul play in his offering chinese rice to her in the pretext on which he lured her to accompany him. Therefore, it is in the course of same transaction that he took her to the terrace but in what manner and how is absolutely irrelevant. Those are the facts specifically within the knowledge of the accused. Finding of the dead body of Bhagyashree on the terrace clearly shows that she was taken to the terrace.

35. Mrs. Nair also drew our attention to the bunch of the photographs tendered by the prosecution and tried to make certain submissions on that basis. At the same time, she also pointed out that the photographs were tendered in evidence without her consent and at the time when she was absent and that the photographs could not have been exhibited. We have gone through the entire original record. We find that the prosecution merely filed an application for production of the photographs and the court passed an order - production allowed. The court has not passed an order that the photographs be exhibited or taken as piece of evidence. Obviously, the

court should not have done it for getting the photographs proved from the photographers or unless the accused gives his admission for taking those photographs on record. Therefore, what remains is that the photographs were not proved or not taken on record as exhibits, they cannot, therefore, be looked into and the submission of Mrs. Nair in that regard cannot be considered.

36. In view of the above, we have no hesitation in concluding that it is the accused who committed the sexual assault on the deceased and then murdered her.

37. The learned counsel for the accused relied on the decisions of the Supreme Court in the case of **Hanumant Govind Nargundkar and another vs. State of Madhya Pradesh, reported in A.I.R. 1952 Supreme Court 343** and in the case of **Sharad Birdhichand Sarda vs. State of Maharashtra, reported in AIR 1984 Supreme Court 1622..** In these two decisions the Supreme Court had laid down the conditions that must be fulfilled before a case against an accused based on the circumstantial evidence can be fully established. Applying those conditions in **Hanumant Govind Nargundkar's case (AIR 1952 SC 343)**, Their Lordships have observed in para-10 as follows :-

. "[10] Assuming that the accused Nargundkar had taken the tenders to his house, the prosecution in order to bring the guilt home to the accused, has yet to prove the other facts referred to above. No direct evidence was adduced in proof of those facts. Reliance was placed by the prosecution and by the courts below on certain circumstances, an intrinsic evidence contained in the impugned document, Ex. P-3A. In dealing with circumstantial evidence the rules specially applicable to such evidence must be borne in mind. In such cases, there is always the danger that conjecture or suspicion may take the place of legal proof and therefore, it is right to recall the warning addressed by Baron Alderson to the jury in Reg. vs. Hodge (1838) 2 Lewin 227, where he said :

> "The mind was apt to take a pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one connected whole; and the more ingenious the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete."

. It is well to remember that in cases where the evidence of the circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, their must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused. In spite of the forceful arguments addressed to us by the

> learned Advocate-General on behalf of the State we have not been able to discover any such evidence either intrinsic within Ex.P-3A or outside and we are constrained to observe that the Courts below have just fallen into the error against which warning was uttered by Baron Alderson in the above mentioned case."

In **Sharad Birdhichand Sarda's case (supra),** the Supreme Court held as follows :-

> The following conditions must be fulfilled before a case against an accused based on circumstantial evidence can be said to be fully established ;
>
> (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must or should' and not 'may be' established.
>
> (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.
>
> (3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

. A case can be said to be proved only when there is certain and explicit evidence and no person can be convicted on pure moral conviction.

38. We find in the present case that the prosecution established the fact that the deceased was last seen together with the accused. Her body was seen discovered on the terrace of the dog house. The blood on her clothes matched the blood on the clothes of the accused. Even the earth found on the clothes of the deceased and the accused tallies with the earth recovered from the terrace. These circumstances are conclusive and exclude every hypothesis except the guilt of the accused. There is no circumstance consistent to the innocence of the

accused. We are of view that "within all human probability the act must have been done by the accused".

39. The learned counsel for the accused also relied on the decision of the Supreme Court in the case of **Shankarlal Gyarasilal Dixit vs. State of Maharashtra, reported in 1981 Supreme Court cases (Cri) 315;** where Their Lordships found that the accused could not have been convicted on the circumstantial evidence and in that case, we find that this was because the presence of the accused in her house when the dead body was discovered, was a link which had snapped.

40. It was argued by the learned counsel for the accused that the chemical analyser’s report and the medical evidence show that there was no blood in the nail of the deceased and no vaginal fluid was found on the genital wash from the accused. We do not see how this can in any way establish the innocence of the accused since the deceased was a young girl of hardly about 11 years of age and was physically much weaker than the accused and may not have been able to prick the nails deep in the body of the accused. Having regard to the age it is possible that no vaginal fluid detected from the genital wash of the accused.

41. The learned counsel for the accused also argued that medical certificate does not show any injury on the accused since none has been referred to. Having regard to the relative size and weakness of the deceased in comparison to the accused, we find no merit in this argument. The accused is a fully grown adult, weighing 68 kilograms with a height of 5’.5"; whereas, the deceased was a girl of tender age and may not have succeeded in making any injury on the accused.

42. On behalf of the accused much stress was laid on the fact that the terrace of the dog house on which the body was discovered, did not have any access in the form of staircase and that the prosecution has not satisfactorily proved that the accused carried the body on to the terrace. In the first place, it is difficult to imagine how the prosecution could have proved the mode by which the accused carried the body or carried the girl on the terrace while she was alive. It was a fact that the body was found there on the terrace and that the terrace was not completely inaccessible. It has come in the evidence of PW-1 that the body was removed with the help of slider or ladder. Obviously, such a ladder could have been employed for reaching the terrace. In any case, it is clear from the evidence of the boy- PW-8, Sahebali Shaik, who found the body on the

terrace that was accessible since he climbed it in order to retrieve his ball. Whether the accused used a temporary ladder or both of them climbed the grill to reach the terrace is a fact that can never be known. However, it is clear that it was possibly for the deceased to reach the terrace where she was carried by the accused or otherwise, since as a matter of fact the body was found there.

43. In this view of the matter we consider it appropriate to accept the findings of the learned Sessions Judge that the accused is guilty of offences punishable under sections 364, 366, 376, 377, 302 and 201 of I.P.C.. It is clear from the evidence that induced the deceased to go with accused with a view to treat her to some chinese fried rice. The deceased followed the accused mainly because she trusted him as he was well known to her family and was in fact referred to as Arjun Mama. Having so lured her away from the house, the accused kidnapped her and then having a forceful intercourse against the order of nature, raped her and then throttled her to death. We, therefore, consider it appropriate to uphold the findings of the learned Sessions Judge, punishing the accused under the said sections of the Indian Penal Code.

44. We have heard the parties on the question of sentence. The learned counsel for the accused submitted that the accused has no criminal record and is not a menace to the society in any manner; that he did not abscond and he stays with his mother and sister. She, therefore, submitted that the case is not the rarest of the rare and the accused may be shown leniency. The learned counsel for the accused relied on the case of **Bantu alias Naresh Giri vs. State of M.P., reported in AIR 2002 Supreme Court 70.** That was a case where a six year old child was raped and murdered and Their Lordships commuted the sentence to imprisonment for life. We, however, find that the facts of this case were different and in fact no injuries were found on the deceased. Similarly, we find that the circumstances in the case of **Surendra Pal Shivbalakpal vs. State of Gujarat, reported in 2005 Supreme court cases (Cri.) 653** and in the case of **State of Maharashtra vs. Mansingh, reported in 2005 Supreme Court Cases (Cri) 657,** are different.

45. In Surendra Pal Shivbalakapal’s case the accused was found to be a migrant labourer from Uttar Pradesh, living in impecunious circumstances though he had raped and murdered a minor. It was found that he would not be a menace to the society in future. The fact do not show

a sexual perversity such as an unnatural offence or extreme force, as we find in the present case.

46. In the second case, similarly the aforesaid facts are absent.

47. The learned counsel for the accused then relied on a decision of the Supreme court in AIR 2001 Supreme Court 2043, the case between **Raju vs. State of Haryana;** where the Supreme Court did not find the murder to be the rarest of the rare case particularly, since the accused was found to have had no intention to commit the murder and the injuries were inflicted at the spur of the moment because the deceased, a young girl of about 11 years, had threatened to report the incident.

48. We find that the offences in those cases were not committed in the same set of circumstances which stand out in this case, namely, allurement of the victim by the accused, who was known to the family and was trusted by the victim; a perverse sexual assault against the order of nature on the victim and the use of extreme force for killing the victim, more so without any provocation. In this case, the accused was called as Arjun Mama by the victim's family as well as by the victim. There was obviously a relationship of trust

between the victim and the accused. He exploited that relationship and lured her with the offer of giving her chinese rice of which she may have been fond of. In fact, he used to often give things like this as narrated by the victim's mother. There is no reason why a young girl would have accompanied him but for the trust she had in him. Having accomplished that the accused relentlessly assaulted her and even had sex with her against the order of nature and as a finale to the incident, strangulated her with his bare hands and covered her body with garbage and debris and walked away, reveals an unusual depravity in the accused and a desire to satisfy his lust even at the cost of destroying a young girl's life. There is no doubt that such offenders are a menace to the society and do not stop at destroying the chastity and the life of innocent and helpless girls.

49. We find from the evidence that there are virtually no mitigating circumstances and the balance is lopsided with aggravating circumstances. While submitting that the sentence imposed by the trial court be maintained, the learned Additional Public Prosecutor relied on the decision of the Supreme Court in the case of **State of Uttar Pradesh vs. Satish, reported in AIR 2005 Supreme Court 1000;** where the Supreme Court

restored the judgment of the trial court, awarding death sentence, while setting aside the judgment of the High Court. The victim in this case was a six year old girl. Their Lordships reiterated the guidelines for imposing the death sentence which emerges from the decision in the case of Bachan Singh vs. State of Panjab (1980) 2 SCC 684 and Machhi Singh vs. State of Panjab (1983) 3 SCC 470.

50. Their Lordships in paragraphs Nos.28 and 29 in the case of **State of U.P. vs. Satish (supra)** have observed as follows :-

> . "28. A convict hovers between life and death when the question of gravity of the offence and award of adequate sentence comes up for consideration. Mankind has shifted from the state of nature towards a civilized society and it is no longer the physical opinion of the majority that takes away the liberty of a citizen by convicting him and making him suffer a sentence of imprisonment. Award of punishment following conviction at a trial in a system wedded to the rule of law is the outcome of cool deliberation in the court room after adequate hearing is afforded to the parties, accusations are brought against the accused, the prosecuted is given an opportunity of meeting the accusations by establishing his innocence. It is the outcome of cool deliberations and the screening of the material by the informed man i.e. the Judge that leads to determination of the lis."
>
> . "29. The principle of proportion between crime and punishment is a principle of just desert that serves as the foundation of every criminal sentence that is justifiable. As a principle of criminal justice it is hardly less

> familiar or less important than the principle that only the guilty ought to be punished. Indeed, the requirement that punishment not be disproportionately great, which is a corollary of just desert, is dictated by the same principle that does not allow punishment of the innocent, for any punishment in excess of what is deserved for the criminal conduct is punishment without guilt."

51. The learned APP further relied on the decision of the Supreme Court in the case of **Dhananjoy Chatterjee alias Dhana vs. State of West Bengal, reported in (1994) 2 Supreme Court Cases 220;** where the victim was a young girl and was killed by a security guard, who was supposed to guard life. The Supreme Court observed as follows :-

> . "15. In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment."
>
> . "16. The sordid episode of the security guard, whose sacred duty was to ensure the protection and welfare of the inhabitants of the flats in the apartment, should have subjected the deceased, a resident of one of the flats, to gratify his lust and murder her in retaliation for his transfer on her complaint, makes the crime even more heinous. Keeping in view the

> medical evidence and the state in which the body of the deceased was found, it is obvious that a most heinous type of barbaric rape and murder was committed on a helpless and defenceless school-going girl of 18 years. If the security guards behave in this manner who will guard the guards ? The faith of the society by such a barbaric act of the guard, gets totally shaken and its cry for justice becomes loud and clear. The offence was not only inhuman and barbaric but it was a totally ruthless crime of rape followed by cold blooded murder and an affront to the human dignity of the society. The savage nature of the crime has shocked our judicial conscience. There are no extenuating or mitigating circumstances whatsoever in the case. We agree that a real and abiding concern for the dignity of human life is required to be kept in mind by the courts while considering the confirmation of the sentence of death but a cold blooded preplanned brutal murder, without any provocation, after committing rape on an innocent and defenceless young girl of 18 years, by the security guard certainly makes this case a "rarest of the rare" cases which calls for no punishment other than the capital punishment and we accordingly confirm the sentence of death imposed upon the appellant for the offence under section 302 IPC.. The order of sentence imposed on the appellant by the courts below for offences under Section 376 and 380 IPC are also confirmed along with the directions relating thereto as in the event of the execution of the appellant, those sentences would only remain of academic interest. This appeal fails and is hereby dismissed."

52. Having regard to the aforesaid decision cited by the learned APP, we are of the view that the crime before us is brutal, revolting and dastardly so as to arouse intense and extreme indignation of the community. It is aggravated by the fact that it is committed by a person who was in a position of trust to the victim.

For such an offence we are of the opinion that it is the rarest of the rare case for which life sentence seems to be inadequate. We, therefore, accept the confirmation case No.01/ 2006 and dismiss the Appeal of the accused being Criminal Appeal No.243 of 2006.

53. Before parting with the judgment, it is necessary to mention that while dealing with the aspect of sentence the trial court in para-26 observed as under :-

> "There is no word to express in which manner present accused committed offence. Here I am not giving benefit under section 360 of Cr.P.C.. Hence, I do not agree with accused's Advocate as argued. Accused is having opportunity to challenge judgment before Competent Appellate Court. Hence, I am going to pass the following order"

Though the trial court has given some reasons for imposing death sentence, these observations of the court that the accused has a liberty to challenge the judgment before the higher courts were unwarranted. Sentence cannot be imposed on the accused by the trial court

under this belief. In any way the accused has a right to appeal before the higher court. Thus the said observations are uncalled for and the learned Judge should be informed by the office accordingly.

54. In the result, we pass the following order:-

ORDER

. Reference is accepted.

. Criminal Appeal No. 243 of 2006 filed by the accused- Arjun Laxman Jogadiya challenging his conviction and sentence is dismissed.

. Death sentence imposed upon the accused- Arjun Laxman Jogadiya is confirmed. His conviction under other sections of the Indian Penal Code and the sentence imposed upon him under those sections is maintained.

. Order relating to the Muddemal Property passed by the Sessions Judge is kept as it is.

. The operation of this order is stayed for a period of eight (8) weeks from today to enable the accused Arjun Laxman Jogadiya to move to the Supreme

Court if he so desires.

. Certified copy of the judgment to be made available to the accused Arjun Laxman Jogadiya at the earliest.

(D.G.DESHPANDE,J)

(S.A. BOBDE, J)

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